



**Gachori v Republic (Criminal Appeal E044 of 2023)  
[2024] KEHC 5063 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5063 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E044 OF 2023  
DKN MAGARE, J  
MAY 13, 2024**

**BETWEEN**

**PETERSON GITHINJI GACHORI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appeal relates to an appeal from the decisions of the Hon. V.S. Kosgei given on 14/6/2023 and 3/7/2023. The Appellant was charged with the offence of attempted defilement under Section 9(1) 2 and 119 of the *Sexual Offences Act*.
2. The appellant filed a petition of Appeal. The court gave directions. Parties submitted.

**Background**

3. The Appellant was charged on 20/4/2002 that on 14/4/2020 in Mathhira East Sub-county within Nyeri unlawfully attempted to cause his penis to penetrate the vagina of S.W, a child aged 11 years.
4. The matter was placed before me wherein the Appellant stated that the was framed by his ex-girlfriend. The state conceded that the Court erred in convicting on both the main count. They supported the conviction on the main count.
5. There was a petition of Appeal filed by the Advocates, being No. 44 of 2023. I gave directions on how to proceed. The petition raises the following grounds: -
  - a. The learned magistrate erred in fact and in law in finding the existence of the essential elements of attempted defilement and indecent act with a child as defined in Section 9 (1) (2) and 11 (a) of the *Sexual Offences Act* (No. 3 Laws of Kenya).



- b. The learned magistrate erred in fact and in convicting the accused based on the unsafe evidence of two minors taken without the proper and prerequisite administration of *voire dire*.
  - c. The learned magistrate erred in fact and law in relying on medical evidence that otherwise disproved a conclusion as to attempted defilement and commission of an indecent act.
  - d. The learned magistrate erred in fact and in law by failing in entirety to appreciate the evidence and submission by the Appellant regarding the events leading to and on the material date of the alleged offences.
  - e. The learned magistrate erred in fact and in law in finding that the prosecution had proved its case against him beyond reasonable doubt.
  - f. The learned magistrate erred in finding the Appellant guilty for the twin offences of attempted defilement and indecent act with a child and proceeding to pass sentence thereon.
6. The charges were read on 20/4/2020. The appeal conducted *voire dire*. Unfortunately, the child did not understand the oath. She stated that if one lies and confesses then, then they are forgiven. If they don't confess they go to hell. The *voire dire* for PW1 was thus unsafe. The child did not understand oath. However, the court ruled otherwise.
  7. The complainant stated that she was born on 23/2/2008. She stated that she was 11 years. As a fact as at 14/4/2020, she was 12 years and 2 months. She stated the Appellant was a customer to her mother. He was carrying her on *boda boda*. She stated that on 14/4/2020 the Appellant knocked the door and the witness opened.
  8. The appellant entered the house and removed his phone and showed the child videos The mother was there at 1 pm. The mother was settling on what to buy. The Appellant gave a sum of Ksh.200 to the younger child to buy food.
  9. The appellant asked the minor to sit on his things and touched the minor's private parts and breasts. He removed his belt and his private part. He asked that the minor spreads her legs. The sister came and they put on clothes. They were in different rooms.
  10. She further stated that The minor went to cook eggs. The Appellant went to sleep in the mother's bed. At 3 pm the Appellant left. The witness told the mother who called the police. They went to Karatina police station. The minor on, cross stated that they talked to the mother through the phone.
  11. PW2 testified on oath. No *voire dire* was carried on her. I do not know the weight to put on her evidence. She stated that when she came back, the Appellant was in the mother's bed while the complainant was cooking whereas she stated that she found the Appellant fastening the belt and Sarah putting on clothes.
  12. On cross, the appellant was on the mother's bed and Sarah was cooking. I am at pains to understand PW2's evidence. The eggs which were to be cooked and which PW1 was cooking were with the witness.
  13. PW3 testified that PW1 is her daughter. He knew the Appellant in 2010. She met the Appellant after 10 years. She stated that the witness did not like the Appellant for a father. The appellant was arrested on Friday in the house. The Appellant slept in the house after the happening of the event and was arrested on Friday.
  14. PW3 stated that they separated acrimoniously in 2010. She denied that the charge is trumped up. She stated that the Appellant called at 1300 hours. He was in the house and wanted to say see the children. He was their putative father at some stage.



15. A neighbour reportedly said the accused in her bed though a widow. The neighbor was not a witness. She stated that even when they moved out refused to accept the Appellant who kept asking for forgiveness. This was not for the offence but for the relationship. It looks like PW 3 was determined to leave the appellant. The appellant was still infatuated to PW 3. The witness stated that they parted ways but the Appellant kept looking for her.
16. PW4 stated that he was the arresting officer. At this point PW1, PW2 and PW3 were called for further cross examination. PW1 stated that the appellant went to the house at 11:35 am. He came while she was with her sister. She stated that she was not aware of the relationship between the Appellant and the minor's mother. She stated that the accused left and they moved out. The investigating officer stated that the Appellant forced the minor to touch his penis and touched her private parts. He also used his penis to touch the vagina
17. When the appellant went to the house he was arrested. They stated that the report was defilement. When they went to hospital there was no defilement. She stated that she did not carry out independent investigations.
18. He stated that the P3 did not disclose any offence. Dr. Nguru Maina testified. The doctor stated that it was alleged to be defilement but it was not found. He was questioned when the P3 indicated harm when there was no injury. He stated it was due to psychological. The doctor was candid on some of the conclusions he reached.
19. The appellant gave sworn testimony. He stated that she had a sexual relationships that end in March 2002. It ended before the allegations. He used to go to the house. she stated that this relationship ended since the father to the younger child used to call her. She reported the case.
20. Parties filed submissions. The court found them Appellant guilty of both attempted defilement where he was sentenced to life imprisonment and on the alternative count the court sentenced the Appellant to 10 years imprisonments. It is against these that the appellant appealed.

### **Analysis**

21. The case has not been easy to deal with. There are certain errors that were made that soiled the broth. Evidence of PW2 is totally otiose. It is not clear whether she was able to tell the truth. No voir dire was carried on her. The voir dire was carried on PW1 when it was clear she did not understand the meaning of telling the truth. Her belief that that lies if confession, if contested make the unsuitable as a witness to be sworn.
22. Secondly, she was 12 years when there was an attempt to defile her. She mistakenly believed to be 11 years. The birth certificate so said to be of a birth on 23/4/2008 not 23/2/2008 as parties testified.
23. The second aspect is the acrimony between the Appellant and PW3. The complainant lied that she did not know the relationship between the mother and the Appellant. On the other hand, she reported to PW3 that she did not like the Appellant as a father. It is clear that the offence that was reported was defilement.
24. The medical evidence shown there was none. The medical evidence is not useful for the kind of offence. This is because there could possibly be no medical or forensic evidence left behind. The minor's evidence vis-a-vis the Appellant will determine the case. The Appellant was consistent that this were trumped up charges. The Appellant was arrested after using the ex-girlfriend days later.



25. The same man slept in the house till Friday the complainant called the police. This is not a character of a person who has issues with attempted defilement of her children. The PW3 wanted to have it both ways. Continue to obtain massage services at the same time, set the minor against the Appellant.

26. There is on the other had a possibility that the first minor is stating the truth. This rests entirely on her believability and on the basis of reasons recorded that the minor complainant was stating the truth. Section 124 of the [Evidence Act](#) provides as follows: -

“Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

27. The evidence of PW1 is shaky. The evidence of PW2 cannot be used in the absence of Voire dire. PW3 based her decision on a rumour from a neighbour. The neighbor was not called. She waited for long to call the police when she wanted to get rid of her ex cum current girlfriend. Failure to call the neighbor who saw, whatever he saw makes Pw3’s evidence hearsay. In the case of Republic v Thomas Onyango Ogedi [2020] eKLR, Justice, KIARIE WAWERU KIARIE, was of the view that failure to call witnesses, an adverse inference should be made. By stating

“Failure to adduce such crucial evidence may only lead to an inference that had it been adduced, it could have been adverse to the prosecution case. In the case of *Bukenya vs Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

28. This is not a case of reasonable doubt or paucity of evidence, it is a case where someone had a chance to tender independent evidence but did not. Section 143 of the [Evidence Act](#) (Cap 80 Laws of Kenya) provides as follows:-

“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”

29. However, I am equally persuaded by the reasoning of Odunga, J as he then was in *Bernard Philip Mutiso v Tabitha Mutiso* [2022] eKLR where the learned judge stated as follows:

53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of



PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

30. All these evidence falls far short of reasonable doubt. There is no equality for doubt as any doubt is given to the Accused. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first Appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment Appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

31. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first Appeal:

“An appellant on a first Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

32. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove



the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

33. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Suupreme court of Canada explained the standard of proof as doth: -

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

34. According to Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

35. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

36. On the offence itself, there are three elements to be proved were;

- a. Age
- b. Attempted penetration of a minor’s vagina.
- c. The attempt is by use of a penis



12. The age of the minor is not disputed. It is either 11 or 12 years though the charge sheet indicates 11. The minor was born either 23/2/2008 or 23/4/2008, depending on the evidence. The offence was alleged to be on 14/4/2020, when she was 12 years, 2 months and 9 days. This changes profoundly the applicable sentence not the conviction is upheld. For what I am about to state, it may not be necessary to resolve the age.

12. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

12. Nothing on age as the child was clearly under 18 years. The age does not go to the offence for attempted defilement but a consideration in sentencing. Attempted defilement is not graduated as defilement itself.

12. Section 9 of the *Sexual Offences Act* provides as follows: -

“9.

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

(3) The provisions of section 8(5),(6),(7) and (8) shall apply mutatis mutandis to this section.

12. The sections referred in section 9(3) above provides as follows: -

(5) It is a defence to a charge under this section if –

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children’s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.



37. Ipso facto the meting out of a life sentence was unlawful. In absence of any extenuating circumstances, the sentence that was to be meted was 10 years. I therefore set aside the sentence of life imprisonment. If the Appellant was guilty, I would have sentenced him to 10 years imprisonment.
38. The report received was on defilement but on examination there was no penetration. The doctor erroneously indicated harm when there was no injury. Harm is defined in the P3 as any bodily hurt, disease or disorder whether permanent or temporary. I expect that parties must know their birthday. I do not want to imagine anything regarding the birth certificate. The minor indicated she was born on 23/2/2008.
39. With the known acrimony and the lack of credibility on part of PW1, there is serious doubt. The second, minors evidence does not help much. The evidence was that Githinji was in the house. However, he was sleeping in the mothers bed and the other minor was cooking.
40. This evidence of alleged defilement is not supported by evidence. Without the court having provided with a finding on Section 124, this court's hands are tied. It is the court below that saw the witnesses. She had not stated any reason to believe her evidence. For my part, the indication that she knows she can lie but confess, makes her evidence unsafe.
41. It also does not make sense that the child could did not know the relationship. The mother had with the Appellant. The mother confesses to a bitter break up. The acrimony may have taken a bigger part in this case. I am unable to separate the events and the acrimony that was in situ. This is coupled with the conduct of Pw3 before the Appellant's arrest.
42. Section 143 of the Evidence Act (Cap 80 Laws of Kenya) provides as follows: -  
“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”
43. However, I am equally persuaded by the reasoning of Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR where the learned judge stated as follows:  
“ 53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.”
44. I am aware that no amount of evidence or witnesses are needed to proof a case. In this case however both the mother and the evidence of PW1 is not credible. It needed to be corroborated.
45. That corroboration is not there. In the circumstances, I give the Appellant a benefit of doubt. I set aside the conviction and sentence and set the appellant free unless otherwise lawfully held.



**Order**

46. The net effect of the foregoing is that I find that the Appeal is merited. I allow the same, set aside conviction and sentence and set the appellant free unless otherwise lawfully held.

47. The Appellant's name be removed from the list of sexual offenders.

DELIVERED, DATED and SIGNED at MOMBASA on this 13<sup>th</sup> day of May, 2024. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

No appearance for Appellant

Appellant present

Ms Kaniu for the state.

Court Assistant- Brian

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